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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA	*	
	*	
v.	*	21-cr-41-01-JL
	*	21-cr-41-02-JL
IAN FREEMAN AND ARIA DIMEZZO	*	September 1, 2022
	*	9:45 a.m.
	*	

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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

<u>For the Government:</u>	Seth R. Aframe, AUSA
	Georgiana MacDonald, AUSA
	John J. Kennedy, AUSA
	U.S. Attorney's Office

<u>For the Defendants:</u>	
(Ian Freeman)	Mark L. Sisti, Esq.
	Sisti Law Offices
(Aria DiMezzo)	Richard Guerriero, Esq.

<u>Court Reporter:</u>	Susan M. Bateman, RPR, CRR
	Official Court Reporter
	United States District Court
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1 P R O C E E D I N G S

2 THE CLERK: The Court is now in session and has  
3 before it for consideration a motion hearing in criminal case  
4 21-cr-41-JL, United States versus Ian Freeman, et al.

5 THE COURT: All right. Good morning everybody.

6 We're here on a motion to dismiss the latest  
7 indictment, which is the superseding indictment. I have a  
8 copy of it right here which I've been reviewing with an eye  
9 toward this motion. It's dated April 25th of this year.

10 I've read your submissions of course.

11 Mr. Sisti and Mr. Guerriero are here for the  
12 defendants.

13 I've got three AUSAs here, AUSAs MacDonald,  
14 Kennedy, and Aframe, for the prosecution.

15 All right. It's your motion, defense. I'm  
16 listening.

17 MR. GUERRIERO: Good morning, your Honor.

18 THE COURT: Good morning.

19 MR. GUERRIERO: My expectation is mostly that the  
20 Court would have a lot of questions, but I do think I can  
21 summarize our argument fairly succinctly.

22 THE COURT: I do think I understand it. I really  
23 do. I probably won't have that many questions, but I get it.

24 Go ahead.

25 MR. GUERRIERO: Okay. I mean, at the outset that's

1     what I'm -- I don't need to make a formal presentation. I'm  
2     happy to have a question at any time.

3             Our argument is fairly simple. Our position is  
4     that Congress has not authorized any federal agency to require  
5     the registration of money transmitting businesses that are  
6     involved in the exchange of virtual currency or fiat currency,  
7     and that argument is based on the statutory history. And,  
8     most importantly, and this is really sort of the crux of our  
9     case, most importantly on the recent U.S. Supreme Court  
10    decision in West Virginia versus EPA.

11            I mean, frankly, I think that we're on the leading  
12    edge of something here because that case really was a sea  
13    change and makes a lot of the cases that came before it,  
14    especially district court cases dealing with Chevron and those  
15    sort of issues, I think it undermines a lot of those cases,  
16    and even in the U.S. Supreme Court we have to follow that.

17            THE COURT: I think that's fair.

18            MR. GUERRIERO: So our argument, as I said, is that  
19    this statute was enacted in 2001 before virtual currency  
20    bitcoin was ever invented. Seven years before it.

21            So after that -- or in that statute there is one  
22    word which the government clings to, the word funds, and they  
23    say that because the statute authorizes the Secretary of the  
24    Treasury and FinCEN to require a licensing of money  
25    transmitters, that funds should be read to include that.

1           Our position is not based on the definition of the  
2 word funds. As we said in our motion, many courts have found  
3 that the word funds can be interpreted to include virtual  
4 currency. That's not our point any more than it was the point  
5 in Utility Air, as explained in the Utility Air case, as  
6 explained by the Supreme Court in the West Virginia case that  
7 someone could argue that greenhouse gases fall within the  
8 scope of the word pollutant. Of course it does, and that's  
9 why the West Virginia case says -- the point is not whether  
10 there is a plausible basis in the text of the statute. The  
11 point is whether Congress clearly authorized a federal agency  
12 to regulate a big, new, socially important part of the  
13 economy. And what we tried to demonstrate in our motion is  
14 that virtual currency is exactly that, and that the major  
15 questions doctrine recently described by the Supreme Court, I  
16 think it's for the culmination of a whole line of cases, that  
17 under that doctrine this is such an area, and, therefore, it  
18 was wrong for FinCEN and the Department of Treasury to have  
19 this requirement.

20           That's our argument in a nutshell.

21           THE COURT: Okay. But can't the government's case  
22 proceed without -- let's assume you're right about that.  
23 Let's assume that you're right about the idea that -- does it  
24 matter if the statute itself authorizes the registration of  
25 this activity?

1 MR. GUERRIERO: Right. And that's the first --

2 THE COURT: It doesn't really matter what FinCEN  
3 says, right?

4 MR. GUERRIERO: I think it does, and here's why.

5 First of all, an interesting, just sort of a  
6 preliminary point, but in the government's first argument they  
7 take great pains to emphasize that the word or is used in the  
8 statute, but actually in the superseding indictment in this  
9 case they refer to a violation of the requirement and they say  
10 and the statute and the regulations.

11 THE COURT: They do.

12 MR. GUERRIERO: And there's a good reason for that.  
13 Because Congress doesn't enforce any statute. The statute has  
14 no meaning without regulation, and that is exactly why this  
15 same statute says the Secretary of Treasury shall pass  
16 regulations implementing this statute.

17 Another way to think about it is --

18 THE COURT: Yeah, but the agency that is enforcing  
19 the statute now isn't the Treasury. It's DOJ.

20 MR. GUERRIERO: Well, it's FinCEN which I --

21 THE COURT: DOJ is. DOJ is the one in court  
22 enforcing the statute. That's my point.

23 MR. GUERRIERO: Okay. All right.

24 THE COURT: And aren't they able to interpret the  
25 statute reasonably? I mean, look, that's my point. Does it

1 really matter what FinCEN does? If the DOJ says the statute  
2 requires this registration and views this conduct as violating  
3 the law, what difference does it make what FinCEN says about  
4 it?

5 MR. GUERRIERO: Well, because FinCEN decides who's  
6 within the scope of this and according to their own guidance,  
7 and in fact that's what the indictment says. FinCEN is -- you  
8 know, the failure to --

9 THE COURT: Where does the indictment say that?

10 MR. GUERRIERO: Excuse me again?

11 THE COURT: Where does the indictment say that,  
12 that FinCEN decides who comes under the statute? I don't read  
13 the indictment that way.

14 MR. GUERRIERO: Well, the indictment doesn't say  
15 that. The indictment says failure to comply with the statute  
16 and the regulations, which I think they should say because the  
17 statute says the Department of Treasury shall adopt these  
18 regulations.

19 THE COURT: Well, looking at Count 1, right?

20 MR. GUERRIERO: Yep.

21 THE COURT: Look at Count 1, paragraph 12. It says  
22 that Freeman, DiMezzo, and others unlawfully, wilfully, and  
23 knowingly violated federal law in violation of a statute.

24 Now it says in the next paragraph it was part of  
25 the object of the conspiracy, and it describes the conduct as

1 failure to comply with money transmitting business regulations  
2 set forth in the statute and the regs, right?

3 MR. GUERRIERO: Right. Well, one way to look at it  
4 is this. There's only one registration required. Like, if I  
5 came in and said I registered per the statute so I ignored the  
6 CFRs, that wouldn't make any sense because the -- I mean, and  
7 if you think about -- I mean, it really almost goes to the  
8 constitutional basis of how these things work.

9 Congress passes a law, the Executive Branch  
10 enforces it, and the only way for it to make any sense is to  
11 say, well, the statute is implemented by these regulations and  
12 then the enforcement, the execution of it.

13 THE COURT: Well, yeah, but statutes authorize  
14 agencies to enforce them and implement them and all that, but  
15 this isn't a civil case, like, brought by FinCEN. This isn't  
16 some -- you're not before FinCEN. You're not before the  
17 Treasury. You're before the district court on an indictment  
18 brought by DOJ.

19 They also have to interpret law, and their  
20 interpretation is this conduct violates the law and they got a  
21 grand jury to agree.

22 MR. GUERRIERO: Well, I think their allegation is  
23 you failed to register as required by FinCEN, and that is what  
24 the law says. The law says the Treasury Department shall pass  
25 regulations to govern who regulates and how.

1 I mean, an example of it is the statute also I  
2 think -- as for certain agents, it authorizes FinCEN to set a  
3 cut-off point. So it's clearly -- the statute delegates the  
4 authority to FinCEN or to the Department of Treasury --

5 THE COURT: No disagreement.

6 MR. GUERRIERO: -- to determine the scope, okay?

7 THE COURT: Well, yeah, but to determine the scope  
8 where the statute is ambiguous. I mean, that's the way it  
9 works. That's the Chevron doctrine. Chevron hasn't been  
10 overruled. It's been supplanted by the major case doctrine,  
11 right?

12 MR. GUERRIERO: Right.

13 THE COURT: The major case and questions doctrine,  
14 but that's a doctrine of statutory interpretation. I mean,  
15 that's what that is as far as I've ever known.

16 I admit West Virginia does kind of push it to a new  
17 level, I'm not disagreeing, but up till then every case I had  
18 ever read that was a major case doctrine was sort of a we  
19 decline to apply Chevron because this is such a major social  
20 and political question that we, the Court, need to interpret  
21 the statute.

22 MR. GUERRIERO: Exactly.

23 THE COURT: Okay. Let me get to the nub of it.

24 MR. GUERRIERO: Okay.

25 THE COURT: So can't I say Richard's right --



1 Guerriero is right, this is a major case doctrine type of  
2 question, I'm not going to defer to FinCEN's interpretation of  
3 the statute, but I read the statute and I read the word funds,  
4 and I think it applies to bitcoin? See, that's the way the  
5 major case doctrine works.

6 Now, the Court of Appeals might disagree, the  
7 Supreme Court might disagree, but the major case doctrine  
8 doesn't say case dismissed. It says don't defer to FinCEN on  
9 the meaning of the statute. And under these doctrines as I  
10 have always understood them, the only time you rely -- the  
11 only time Congress is deemed to have delegated, unless it's an  
12 express delegation, right, is if the statute is ambiguous, and  
13 is this ambiguous? I don't think so.

14 MR. GUERRIERO: I think you're half right, your  
15 Honor. And, respectfully, the point at which I think that the  
16 Court is incorrect is in saying that -- the Court is in a  
17 position of determining what this word means in the statute.  
18 That's not the question. The question is did Congress  
19 expressly authorize regulation in this major, new, different,  
20 socially important area.

21 I mean, look, I'll just be frank with the Court.  
22 If the Chevron doctrine applies, if the normal rules of  
23 statutory interpretation apply, we lose, okay? I grant that.

24 And what we're saying is that those rules do not  
25 apply for exactly the reasons set forth in the West Virginia

1 case, and the question is not is there a plausible textual  
2 basis, because that's what you were just describing. The  
3 Court found a plausible textual basis. West Virginia says,  
4 no, that is not the test. We often found a plausible textual  
5 basis.

6 The question is not just what did Congress intend,  
7 but because this is such a big area and because it's so  
8 important, did Congress actually intend to authorize  
9 regulation in this area, and that's our argument.

10 THE COURT: I don't know. I think Congress clearly  
11 did intend. The question is whether -- see, what you're  
12 telling me is this isn't a question of statutory  
13 interpretation, this is a question of executive branch  
14 authority, right? Your point is there's been no delegation to  
15 regulate bitcoin.

16 MR. GUERRIERO: No, clearly --

17 THE COURT: At least not until the 2021 amendments,  
18 right?

19 MR. GUERRIERO: Right.

20 THE COURT: Now, I admit that the indictment here  
21 does make this a little more complicated because it keeps  
22 invoking the regs, and I'll have some questions to the  
23 prosecutors about that, what that means for jury instructions  
24 and evidence and all of that, but -- yeah.

25 But you're asking me to apply the major case

1 doctrine in a way that I don't ever -- like, for example, in a  
2 criminal context, and in ways I've never seen it applied.  
3 I've always seen the major case doctrine applied -- it's not  
4 like it's applied every day. It's a kind of marginal doctrine  
5 of statutory interpretation until and maybe if West Virginia  
6 made it more. I get it.

7 MR. GUERRIERO: That is my point.

8 THE COURT: I know.

9 MR. GUERRIERO: And our point is that -- I mean,  
10 these particular counts -- not the fraud related counts, the  
11 money laundering counts, but these particular counts, these  
12 are regulatory offenses. I mean, I think even the government  
13 would describe it that way. I think that they're regulatory  
14 offenses. They're a failure to get a license to engage in a  
15 particular business.

16 THE COURT: All offenses are regulatory offenses  
17 really, aren't they?

18 MR. GUERRIERO: Well --

19 THE COURT: I mean, let me ask you this way.  
20 Suppose these prosecutors here superseded again, all right?  
21 Pick a Wednesday. They go into the grand jury. They come out  
22 with a brand-new indictment. It looks exactly the same, but  
23 there's no reference to the regulations. Do you still have  
24 the same motion?

25 MR. GUERRIERO: Yes. Yes, we have the same motion

1 because I don't think you can read the -- you can't ignore the  
2 part of the statute that says that the Secretary of the  
3 Treasury shall adopt regulations enforcing this statute.

4 I mean, again, think of it this way. I couldn't  
5 say, oh, I didn't register with FinCEN. I just looked at the  
6 statute and made up my own registration and mailed it into the  
7 Treasury. I mean, you would be --

8 THE COURT: Well, but you could say I read the  
9 statute -- actually, you could. You could say I registered  
10 with the Treasury based on the statutory language. Why  
11 couldn't you?

12 MR. GUERRIERO: Because the statute says  
13 this statute -- it doesn't say the word implemented, but it  
14 says the Secretary of Treasury shall provide regulations for  
15 the enforcement of this statute, and it's clearly what was  
16 intended.

17 As I say, I mean, until we filed this motion it was  
18 even how the government read it. I mean, it was clearly  
19 everybody -- a reasonable reading of the statute is you pass  
20 the statute and you have regs that enforce it, and that's how  
21 it works in every other instance. I mean, I can't think of  
22 another instance where a business would say we're going to  
23 ignore the regs and we're just going to comply with the  
24 statute. I mean, I don't think the government cited --

25 THE COURT: You could comply with the regs by

1 complying with the statute. That's the point.

2           Generally delegations that aren't -- you know,  
3 pre-2021 if the -- you know, you can look at 2021 as changing  
4 the law adding bitcoin or adding virtual currency, right, to  
5 the regulatory scheme, but you can also read it as clarifying  
6 the law. Like it wasn't clear and we want to make it clear.  
7 But it already did regulate virtual currency and bitcoin by  
8 its clear statutory language based on the word funds. You  
9 could interpret it that way.

10           The point is the way this works -- my understanding  
11 is when Congress has -- like the Chevron doctrine. When  
12 Congress has ambiguously expressed something with ambiguity in  
13 an area regulated by the executive agency, that's an implicit  
14 delegation of authority to the agency to interpret and enforce  
15 the statute.

16           The way they do that -- what a regulation really  
17 is -- what a rule really is is a refinement, an interpretation  
18 of a statute. That's all good, but that delegation only  
19 happens when a statute is ambiguous. And if it's not  
20 ambiguous and the statute is clear, there's been no such  
21 delegation and this Court doesn't have to defer to the  
22 agency's interpretation.

23           The fact that this agency interpreted it as  
24 applying to bitcoin pre-amendment is interesting, but I don't  
25 have to defer to it. I can not defer to it. I can interpret

1 the law and say it applied to bitcoin.

2 You're saying I can't do that because of the major  
3 cases.

4 MR. GUERRIERO: That's right.

5 THE COURT: I don't know if that's true or not. I  
6 don't think it is, but I don't know. It certainly isn't  
7 something they're creating precedent for. I mean, specific  
8 precedent for, you know.

9 MR. GUERRIERO: Right. I mean, neither side has a  
10 post Virginia versus EPA case dealing with this kind of issue.

11 THE COURT: True. The burden is on you in this  
12 situation, though, don't you think?

13 MR. GUERRIERO: Excuse me?

14 THE COURT: Isn't the burden on you in this  
15 situation? I mean, you're citing West Virginia for a fairly  
16 novel proposition of law, that a criminal indictment has to be  
17 dismissed because FinCEN/Treasury has exceed its authority in  
18 regulating bitcoin or at least had before the 2021 amendments.  
19 That's your argument.

20 MR. GUERRIERO: Well, I mean, I guess -- I don't  
21 have this in my motion, but your question makes me think of a  
22 hypothetical.

23 What if one of the coal-powered plants that was at  
24 issue and suppose one of them said -- this is kind of more of  
25 a hypothetical than the facts of the case, but what if some

1 coal-powered plant said, you know, we're not going to  
2 subsidize some other industry and we're not going to reduce  
3 our production, and we're putting it in our notes that  
4 everybody can see later that we're going to do that in a  
5 knowing way. I would think that would probably at some point  
6 be criminal conduct, and in that case that coal-powered plant  
7 would have exactly the same kind of motion that we have here.  
8 That there was never any authority to impose that requirement,  
9 that regulation.

10 I mean EPA -- there are many environmental  
11 situations where -- and I've been co-counsel, civil counsel,  
12 in many cases where an environmental case comes close to being  
13 a criminal case. Because if there's some sort of knowing  
14 pollution, knowing violation, knowing skirting of the  
15 standards, it becomes a criminal case.

16 So I think in that hypothetical they would have  
17 exactly the same argument that we have here.

18 And if I can just go back to one of your Honor's  
19 other points?

20 THE COURT: Of course.

21 MR. GUERRIERO: In terms of ambiguity of the  
22 statute in this area, in this kind of major area, as I said --  
23 and I think the government acknowledges this implicitly. They  
24 say that this is a big, new thing, and then they still try to  
25 include it within funds.

1 But, I mean, think of it this way. Before five or  
2 six years ago, like, nobody knew anything about virtual  
3 currency. Like, you could buy a pizza for one bitcoin. And  
4 now it's this multi trillion-dollar industry that's advertised  
5 during the Super Bowl. I mean, it's a huge change. And so to  
6 say it's not the kind of major questions area just doesn't fit  
7 with the facts.

8 THE COURT: That's the thing about the major  
9 questions doctrine, though, not to be critical of our Supreme  
10 Court, but, you know, a lot of things can be thought of as  
11 major questions.

12 You know, my first exposure to the whole doctrine  
13 was the King v. Burwell case on Obama Care. I should call it  
14 the Affordable Care Act, right? But there was really no  
15 question that was a major political social question.

16 I'm not saying this isn't. I'm not. But, see,  
17 again -- here's I think our disagreement. It's not that I  
18 have a problem with the idea that this is a major question. I  
19 don't even know because, like, what passes for a major  
20 question is by no means clear under the law yet. But if I  
21 agree with you that it is, all that says to me the way I  
22 understand the major case doctrine is that it means I don't  
23 defer to FinCEN in interpreting the criminal statute. That's  
24 what it means. It means when I look at funds, I don't have to  
25 go to FinCEN to say does funds include bitcoin. Yes, it does



1 according to FinCEN. I don't have to do that. I can tell it  
2 from the statute. So I don't defer. And it's up to the Court  
3 to interpret the statute. To me it's a doctrine of statutory  
4 interpretation. To you it's a doctrine of executive  
5 authority, and I don't think those things have to be, those  
6 two ideas have to be contradictory. Because to me even if  
7 it's a doctrine of executive authority, it's an executive  
8 agency's authority to interpret its enabling legislation.  
9 Like, I'm allowed to be -- we, as an agency, are allowed to be  
10 in this area doing this work.

11 And that's why I asked you, well, let's suppose  
12 there was no regs, could this prosecution still be underway if  
13 these regs didn't exist, if we struck this language from the  
14 indictment. My sense is that it could, but, yeah.

15 MR. GUERRIERO: I mean, my objection would be no  
16 process for licensing was ever prescribed by the Secretary of  
17 Treasury as commanded by Congress. Therefore, there was no  
18 requirement for somebody to register. I mean, without the  
19 regs, the statute is not implemented.

20 THE COURT: Yeah, I think that -- to the extent  
21 that that has validity, I think it applies to different counts  
22 of the indictment differently. As I read these counts, some  
23 more or less include regulatory authority than others.

24 MR. GUERRIERO: Your Honor, I want to make sure I'm  
25 clear on this point.

1 THE COURT: Yeah.

2 MR. GUERRIERO: In terms of the Court having the  
3 authority to interpret the statute and the question being the  
4 interpretation of the statute, that's just not what the West  
5 Virginia case says. I mean, the exact words are not merely  
6 plausible textual basis for agency action. There has to be,  
7 "clear congressional authorization."

8 Now, you might find, I suppose, that the use of one  
9 word, funds, written seven years before bitcoin was ever  
10 invented was clear congressional authorization.

11 THE COURT: See, I think of the Bostock case now.  
12 Remember that Bostock case under Title VII, the case a couple  
13 of years ago where the Supreme Court said workplace  
14 discrimination against same sex relationships, right, against  
15 sexual orientation call it, right, or sexual identity, and the  
16 Supreme Court said, yeah, that's been unlawful since 1964.  
17 That's what the word sex means. Sex has been --  
18 discrimination on the basis of sex has been unlawful.  
19 Regardless of whether the EEOC figured it out, the agency to  
20 implement it figured it out for many years, you know, Gorsuch  
21 and the majority said sex means sexual orientation. Sex means  
22 sexual identity. That's just what it means.

23 And so Justice Alito's point that, no, nobody  
24 intended that, everybody agreed nobody intended that in 1964,  
25 didn't matter because the words meant what they meant

1 according to the majority.

2 This is the same situation, right? If funds means  
3 bitcoin, even if bitcoin wasn't on anybody's mind at the time,  
4 it means bitcoin.

5 MR. GUERRIERO: I guess I would disagree with that  
6 because I don't see how the Court could find clear  
7 congressional authorization if it didn't exist at the time. I  
8 mean, this is a different thing.

9 THE COURT: Yeah. Different because of course  
10 sexual orientation existed at the time, yeah.

11 MR. GUERRIERO: Right. I mean, this -- you know, I  
12 mean, the government and everyone refers to bitcoin as virtual  
13 currency, but if you --

14 THE COURT: Certain firearms that didn't exist at  
15 the time of the Second Amendment, right, and yet --

16 MR. GUERRIERO: Well, but this is -- this is really  
17 a different thing. Remember that it's not backed by any  
18 government. It doesn't have any intrinsic value. It is a  
19 thing that exists only on the Internet, you know, and so to  
20 say that it's something that Congress was thinking about or  
21 intended in 2001, it just -- I mean, the most that I think the  
22 government can say is that, well, Congress was looking forward  
23 to every possible kind of thing. But if that was true, then  
24 why did Congress add this language in 2020 of --

25 THE COURT: It only means Congress is looking

1 forward to funds. That's all it means. It doesn't mean every  
2 possible kind of thing.

3 I mean, I understand your point, it exists only on  
4 the Internet, but I don't think the fact that it exists only  
5 on the Internet makes it any less real than greenbacks. I  
6 think your clients would agree with that. It's real.

7 The point is it's not backed by any government,  
8 that's true, but -- I don't know. I haven't done a deep dive  
9 on this, but in our country's history there were many types of  
10 currencies. Some were issued by the colonies and the states,  
11 the early states, right? Some were issued by the federal  
12 government. Some were issued by banks. That's actually --

13 MR. GUERRIERO: Well, that's an important  
14 distinction because virtual currency -- I'm sorry. I didn't  
15 mean to interrupt.

16 THE COURT: I'll just finish the point briefly.

17 Some were issued only by private institutions and  
18 entities, yet my sense is they were still regulated by laws.

19 MR. GUERRIERO: I believe they were.

20 THE COURT: By state and federal laws.

21 So the fact that bitcoin didn't exist at the time  
22 of the original enactment -- let me just say this. It's not  
23 that your arguments don't make sense to me. It's just that  
24 you're asking me to take the major case and questions doctrine  
25 and apply it in a way that I'm not sure I can apply it.

1 MR. GUERRIERO: I think your Honor's point is  
2 incorrect for exactly one of the main reasons that bitcoin  
3 exists. Every example you gave involves the two people to the  
4 transaction and a third party, the government, a bank, someone  
5 issuing the funds. There is no third party in virtual  
6 currency.

7 THE COURT: But there was no third party when banks  
8 and financial institutions in the early times of the republic  
9 were issuing money. They were doing it all the time.

10 MR. GUERRIERO: The bank is a third party.

11 So, like, if you say -- like, suppose in the time  
12 before there was a bank issuing -- before the government was  
13 issuing any currency and you just had a bank note, you know,  
14 like in a train robbery in the old movies and they just had  
15 bank notes. So if someone said I'm going to be a money  
16 transmitter or a money exchanger for that, like, there is the  
17 person doing the transmitting, there is the person that wants  
18 the money transmitted, and then there's the bank that has  
19 issued the note, the third party.

20 With virtual currency, with bitcoin, there is no  
21 third party. The interaction is between the person doing --  
22 you know, the people doing the exchange. There's not a third  
23 party in --

24 THE COURT: So this may be something I didn't --  
25 I'm not sure how much this matters for our conversation, to be

1 honest, but now I'm just learning a little bit.

2 So in a bitcoin transaction the bitcoin itself is  
3 literally created by the two parties in the transaction? I  
4 don't think so. I don't. Is that the case?

5 MR. GUERRIERO: It exists on the Internet. I mean,  
6 and so it's -- I mean, I know that it's --

7 THE COURT: You think that's a fantasy and a  
8 phantom. I think that's real.

9 MR. GUERRIERO: Yep.

10 THE COURT: I don't know why you're so old, but I'm  
11 part of 2022 and I realize things on the Internet, they exist,  
12 right? I mean, that's not -- it's no less real. It's no less  
13 real because it's not paper or instrumentalized by a document,  
14 is it?

15 MR. GUERRIERO: No. There's no -- it can be.

16 THE COURT: So there is a third party. Somebody  
17 who's creating that environment for it to exist. There's got  
18 to be a way to express that the bitcoin exists independent of  
19 the transaction between the two parties.

20 MR. GUERRIERO: It is. It's the blockchain on the  
21 Internet.

22 THE COURT: There you go.

23 MR. GUERRIERO: It's the process that's on the  
24 Internet. That's where it exists. And the blockchain is not  
25 a party to anything, And that was the whole point. I mean,

1 the reason that people wanted virtual currency was to be free  
2 of government.

3 THE COURT: Free, yeah.

4 MR. GUERRIERO: That's the whole point.

5 THE COURT: Understood.

6 MR. GUERRIERO: Okay. I think I covered most of my  
7 points.

8 THE COURT: I think you have, too.

9 It's not a -- I'm not trying to say it's, you know,  
10 illogical or, like, you know, a crazy argument. I'm just not  
11 sure I'm prepared to dismiss a criminal indictment based on  
12 it.

13 But I have some questions for the prosecution, and  
14 maybe their answers will help me get there.

15 MR. GUERRIERO: Thank you, your Honor.

16 THE COURT: Help me get to discussing their  
17 indictment, yeah. I'm not sure that's where they want to go.

18 Here's the thing.

19 MR. AFRAME: Yes.

20 THE COURT: You did cite the regs in the  
21 indictment.

22 MR. AFRAME: Yes, because those are --

23 THE COURT: Because -- tell me.

24 MR. AFRAME: Because we allege in the conjunctive.  
25 We've proven the disjunctive. The statute says you can

1 violate the law -- in 1960 says you can violate the law in two  
2 ways. You can violate it by violating the registration  
3 requirement under 5330 or the regulations prescribed  
4 thereunder.

5 So the right way to indict that is with the word  
6 and. The right way to prove that is with the word or.

7 THE COURT: It's always been a weird thing about  
8 indictments.

9 MR. AFRAME: But it is --

10 THE COURT: They allege in the conjunctive but you  
11 can prove in the disjunctive.

12 MR. AFRAME: And we will prove it in the or because  
13 here I think, as I tried to lay out as clearly as I could, the  
14 plain language of 5330 captures bitcoin. But if it didn't and  
15 the words were ambiguous and a regulation was prescribed that  
16 said we take this ambiguous word funds and say it includes  
17 bitcoin, then that, too, would be an alternative way to prove  
18 it.

19 My point in my memo was we don't have to get to the  
20 regulations because every Court, minus one magistrate judge's  
21 opinion, has said that the word funds as used in 5330 in 1960  
22 means bitcoin plainly.

23 And so whether FinCEN said it or not I think  
24 doesn't matter, but it has said it and you could prove it  
25 either way.



1           THE COURT: Let me ask you this question. So  
2 suppose -- how would you feel about the proposition that I  
3 don't dismiss this indictment but I also don't want to buy  
4 that issue on appeal? I don't instruct the jury on the regs.  
5 Like, for example, do you plan to call a witness on the regs?

6           MR. AFRAME: We are prepared to.

7           THE COURT: Do you plan to? Because that's the  
8 question. This could eliminate the issue by not talking about  
9 the regs.

10          MR. AFRAME: So, I mean, I'll say -- I haven't  
11 finalized them. I've written draft jury instructions. I  
12 didn't talk about the regs because my view is that we get  
13 there -- and I tried to do that in this brief as succinctly as  
14 I could. We can get there and I think I got there without  
15 mentioning the regs.

16          THE COURT: Yeah, I get it.

17          MR. AFRAME: And that does -- as Mr. Guerriero  
18 points out, that presupposes you conclude that the word funds  
19 includes bitcoin. But if it does, then you can follow the  
20 chain from 1960(b)(1)(B) to 1530 to 5313 to 5312, and it all  
21 uses the same word funds. And so I think the registration  
22 requirement is established by statute.

23          THE COURT: Yeah, I mean, I certainly think the  
24 statute can be read to establish it. That's for sure.

25               Do you -- but you're not at this point -- at least

1 for the purposes of this hearing you're not at the point where  
2 you're saying the Court could basically -- I don't want to use  
3 the word strike from the indictment because I don't want to  
4 undermine the grand jury's indictment, but just, I don't know,  
5 instruct the case based on statutory language without getting  
6 into the regs.

7 MR. AFRAME: Yes. Honestly, I mean, they may  
8 object to this later, I don't know, something I think is  
9 important about a FinCEN witness is not this. It's sort of  
10 what does registration require one to do and what was not done  
11 here that may be relevant to other parts of the case.

12 THE COURT: Uh-huh.

13 MR. AFRAME: Like, you know, suspicious activity  
14 reports, other BSA requirements that do connect to  
15 registration but then I think connect to our money laundering,  
16 you know, willful blindness idea that, you know, there was  
17 money laundering here. And none of these things that one  
18 might do to know what's going on in the transactions were  
19 done, and it might be relevant to prove what those are. I  
20 don't think that gets to the 1960 count. I think you get to  
21 the 1960 count through the statute.

22 THE COURT: Let me ask you some questions about the  
23 West Virginia case then.

24 MR. AFRAME: Yes.

25 THE COURT: Because I don't think Mr. Guerriero is

1 incorrect when he says -- there is something about the West  
2 Virginia opinion that -- there's something about the West  
3 Virginia opinion that feels like it's treating the major case  
4 doctrine as more than a doctrine of statutory interpretation.

5 MR. AFRAME: Well, I don't think it says that  
6 because I think it specifically says if -- as I understand it,  
7 if we have what appears to be to the Court on its looking at  
8 what's gone on a remedial overreach by the agency, if it feels  
9 like a remedial overreach by the agency, we're not going to  
10 rely on colorable statutory construction. We're going to  
11 require a clear statement. That's a rule of statutory  
12 construction. If we feel like the remedial measures taken by  
13 the agency are having a major affect on the U.S. economy, we  
14 will not presume that merely colorable language is enough. We  
15 will demand a clear statement by Congress.

16 My understanding is that's a rule of statutory  
17 construction. In those circumstances we require a clear  
18 statement where otherwise ambiguity would be enough.

19 My point on the major questions doctrine is there  
20 is no remedial overreach here. I mean, now we're past my  
21 first argument. You would have to say the statute is not  
22 clear. Now the government can't rely on the statute. It  
23 needs the regulations to prove its case.

24 And now the government -- and now the question  
25 would be, well, can the agency reasonably conclude that funds

1 includes bitcoin.

2 THE COURT: Yeah.

3 MR. AFRAME: And what would make it a major  
4 questions doctrine -- if having made that sort of initial,  
5 yes, we can cover bitcoin, I think it becomes the major  
6 questions doctrine if the agency then does something  
7 extraordinary with that determination, like put the coal  
8 business -- try to put the coal business out of business. Try  
9 to eliminate tobacco in the United States. Make every worker  
10 get a vaccination or a test every week.

11 THE COURT: So you're analogizing it with the West  
12 Virginia scenario now, right?

13 MR. AFRAME: Right.

14 THE COURT: Okay.

15 MR. AFRAME: They did something extraordinary.

16 And my point here is they did nothing  
17 extraordinary. They literally said virtual currency is  
18 covered just like fiat currency. What we make fiat currency  
19 do is file a registration. What are we going to do with  
20 virtual currency? File a registration. It's exactly the same  
21 remedy.

22 I think the major questions doctrine is about  
23 extraordinary remedies, and that's why I brought you to the  
24 Massachusetts versus EPA case in my papers where -- what the  
25 Court said there is, you know, sometimes, you know, Congress

1 uses broad words. Then that allows -- why does Congress do  
2 that? Because it can't foresee everything, and then the  
3 agency gets to decide.

4 The overlay of West Virginia is if once they decide  
5 they then do something like try to put the coal business out  
6 of business in the United States, that gives us concern.

7 And I don't see that here. I see the agency doing  
8 what it did for fiat currency, it did for virtual currency.  
9 No agency overreach. No major question.

10 THE COURT: That sounds to me like you're saying  
11 then that you continue to view the major case doctrine -- the  
12 major case and questions doctrine as a doctrine of statutory  
13 interpretation.

14 MR. AFRAME: Yes. Because maybe the agency can do  
15 something extraordinary like that. But if it's going to have  
16 that power, if the Court is going to say it has that power,  
17 it's going to look for a clear statement by Congress and not  
18 rely on what Justice Roberts calls colorable language, which  
19 is not a clear statement.

20 THE COURT: And Mr. Guerriero is calling plausible,  
21 yeah.

22 MR. AFRAME: Yeah.

23 THE COURT: Which I don't think is an issue here.  
24 I just don't. It's not like it's whether it's plausible. I  
25 don't think it's a tough interpretive question.

1 MR. AFRAME: No.

2 THE COURT: All right. I think you've got to be  
3 prepared for the fact that if I deny this motion, I might be  
4 pretty stingy with the regulatory talk at trial.

5 Now, you're telling me you don't even have it in  
6 your jury instructions. So that's a big issue off the table,  
7 but this could come up. I just want you to be aware of that.

8 MR. AFRAME: Yeah, I mean, I think at the  
9 appropriate time, which I don't think is today, we would argue  
10 about what's the purpose of putting that on, but I don't  
11 intend to put it on to say, oh, here's our proof that they  
12 have to register. I mean, I think we get to that element of  
13 the offense without it. I don't think -- I mean, the 1960  
14 offense is a pretty easy offense to prove. They don't have to  
15 know they had to register. They just have to know they didn't  
16 register and they have to be running the business.

17 THE COURT: Does it matter that you say in the  
18 19 -- well, let me see. Yeah, in the conspiracy, the 1960  
19 conspiracy, yeah, you allege that their conduct violated the  
20 statute but it was an object of the conspiracy to fail to  
21 comply with the regs.

22 Does that matter? And if so, why or why not? And  
23 tell me why not. You might want to pull it out. I'm looking  
24 at paragraphs 12 and 13, right?

25 Paragraph 12 you say they conspired to violate

1 1960, but in paragraph 13 you say it's a part and object of  
2 the conspiracy that Freeman and DiMezzo --

3 MR. AFRAME: Yeah, I see it.

4 THE COURT: Okay.

5 MR. AFRAME: So all we did there is quote the  
6 statutory language with the "and". I mean, I think we're back  
7 to the same --

8 THE COURT: And that and's makes it disjunctive so  
9 you can go with one or the other.

10 MR. AFRAME: Right. The only difference in this  
11 statutory language is making the "or" "and". I guess I've  
12 already explained why we did that.

13 THE COURT: Yes.

14 MR. AFRAME: So, you know, I think we can prove you  
15 can allege -- I mean, I don't think this is a multi-object  
16 conspiracy. I just think we're saying that these requirements  
17 can come from one of two sources. And I think that's true,  
18 they can come from one of two sources, but we only have to  
19 prove one of them.

20 THE COURT: One of them. In your overt acts you  
21 don't cite the regs at all.

22 MR. AFRAME: No. These are things they did to run  
23 the business.

24 THE COURT: Count 2 you don't cite the regs at all.  
25 Count 3 you do cite the regs.

1           MR. AFRAME: Count 2 is the same. We say -- in  
2 paragraph 17 we say under Section 5333 and regulations  
3 prescribed thereunder.

4           THE COURT: Oh, wait a minute. I must have  
5 overlooked that. Count 2 --

6           MR. AFRAME: Five lines from the bottom of  
7 paragraph 17.

8           THE COURT: Yes. Thank you.

9           Okay. Disjunctive proof. And I guess that holds  
10 throughout the document. Okay.

11          MR. AFRAME: So, you know, I mean --

12          THE COURT: All right. Anything else you want to  
13 tell me?

14          MR. AFRAME: I don't think so.

15          THE COURT: Mr. Guerriero, do you want to respond?

16          MR. GUERRIERO: I want to reply on a couple of  
17 points, your Honor.

18          THE COURT: Take your time.

19          MR. GUERRIERO: So the first thing that I would ask  
20 the Court to do is look specifically at 5330(a)(2), and  
21 5330(a)(1) is the requirement for registration.

22                 Immediately after that, 5330(a)(2), the Secretary  
23 of Treasury shall prescribe by regulation the -- not one of  
24 the kind of ways -- the form and manner for registering a  
25 money transmitting business.



1           They're only talking about one kind of license or  
2 registration. It says the form and manner.

3           So to say that someone could register under the  
4 statute and completely ignore the regs, that's contrary to  
5 what the statute says.

6           THE COURT: Yeah, but that's just -- to me that's  
7 just like the agency has come up with a form you've got to  
8 fill out, that's all that is, and what it applies to. I'm  
9 with you.

10           But remember he's saying he's not going to have to  
11 prove that. He can prove in the disjunctive. He's saying I'm  
12 prepared to go forward on the statute, not the reg.

13           See, I'm not disputing at all that Congress  
14 authorized, well, post-amendment 2021 expressly authorized  
15 this regulation of this currency, but I don't even think that  
16 there's much of a question that it did so before and did so  
17 reasonably.

18           But you don't have to get into whether it applied  
19 to bitcoin before the 2021 amendments unless you think that  
20 that delegation was in some way ambiguous. That's the only  
21 time you would have to decide -- that's the way the major case  
22 doctrine works. Look, you're citing one case, but it's not  
23 the only case that talks about the major case doctrine. It's  
24 -- I think one way to look at it is, the way Mr. Aframe did,  
25 was when the agency in its exercise of authority that was

1 delegated to it intrudes into an entirely unanticipated area  
2 that, you know, rocks the foundations of our economy and  
3 political system, well, that needs to be -- that needs to be  
4 stricken. That needs to be invalidated.

5 That's the thing. I mean, I don't even know if  
6 this qualifies, to be honest, as a major political and  
7 economic question. It's certainly important, but everything  
8 is important or there wouldn't be federal legislation about  
9 it.

10 It's different. There's something different about  
11 completely changing an entire industry. Like, the entire  
12 monetary system of the United States has not been undermined  
13 by anything that FinCEN or the Treasury did vis-a-vis bitcoin,  
14 has it?

15 MR. GUERRIERO: Undermined may not be the word, but  
16 has the entire financial system of the world been changed by  
17 the advent of virtual currency? Yes, it has. Frankly, I  
18 mean, it is literally a multi trillion-dollar segment of the  
19 economy.

20 THE COURT: No question.

21 MR. GUERRIERO: I mean, like I said -- it's a  
22 shocking amount of change in a short period of time. I mean,  
23 as I said, it was a novelty thing, you know, 12, 15 years ago  
24 that only a few people were involved in, and now a single  
25 bitcoin is worth tens of thousands of dollars. And there's,

1 you know, like I said, advertisements on the Super Bowl.  
2 Every major financial firm deals with it. I mean, it is a  
3 very large change.

4 And one of the reasons I put in my brief the market  
5 capital valuation of the coal-powered electricity generation  
6 part of the economy is this is a lot bigger than that, okay?  
7 And even if the government says, well, we don't care about all  
8 the virtual currency, we're only requiring some people to  
9 register, I mean, this is, you know, many times over bigger.

10 So even if you say, well, only a percentage of the  
11 people involved with bitcoin have to register, only a  
12 percentage are actually doing transmitting and exchanging,  
13 it's still a very large and impactful part of the economy  
14 because they're servicing all those other people that are  
15 owning bitcoin. So I don't think the Court could correctly  
16 find that it's not.

17 To go back to the questions you were asking  
18 Attorney Aframe.

19 THE COURT: Yep.

20 MR. GUERRIERO: So what if this happens? I mean,  
21 you instruct the jury on the statute. We ask you to include,  
22 which I think we fairly could, the part of the statute that  
23 says the Secretary of Treasury shall prescribe by regulation  
24 the form and manner for registering a money transmitting  
25 business.

1 THE COURT: Doesn't he get to inject into the case  
2 something you say is unlawful and then --

3 MR. GUERRIERO: No. I'm saying we want the jury to  
4 know that we don't believe we violated the regulations, and  
5 then the jury says what are the regs.

6 THE COURT: Okay. So if you make the regs part of  
7 the case and the jury hears evidence on it, because I think  
8 that would be fair, right, we don't think that these regs  
9 required us to -- we don't think that these regs required  
10 bitcoin to be registered. We were trying to comply with the  
11 law, right? That's the -- okay. What of it, though? So what  
12 of it? I mean, so then what happens?

13 MR. GUERRIERO: So then we're back to the issue of  
14 whether or not these regulations are valid.

15 THE COURT: So you would be saying we were trying  
16 to rely on them, but they were invalid?

17 MR. GUERRIERO: I'm sorry. Can you say that again?

18 THE COURT: You want to say as a defense, we were  
19 trying to rely on the regs which we didn't think applied to  
20 bitcoin, right?

21 MR. GUERRIERO: No. What I'm saying is that if the  
22 allegation is that they failed to properly register, then we  
23 should be able to request an instruction on the entire  
24 statute.

25 THE COURT: Okay.

1 MR. GUERRIERO: And then the jury asks, well, what  
2 are the regs. I mean, would the Court instruct the jury there  
3 are no valid regs as we want? I don't think that you would do  
4 that if you had decided with the government.

5 THE COURT: I would instruct them on the applicable  
6 law of the statute. You're talking about a jury question,  
7 like, during deliberations?

8 MR. GUERRIERO: Sure. Suppose you don't tell them  
9 anything about the regs --

10 THE COURT: This came up -- we had a case -- this  
11 came up in the Suzanne Brown case, right, that, you know, I've  
12 been dealing with for many years now, but the jury said -- the  
13 jury asked a question that the regs answered, but nobody had  
14 made the regs, at least knowingly made the regs part of the  
15 record in the case. We talked about, well, I could just tell  
16 them the law about the regs. I could do that. And I think,  
17 I'm trying to remember right, the defense didn't want to do  
18 that.

19 What would you do? If they asked the question,  
20 what would you do? Would you want me to just advise them -- I  
21 don't think the prosecution would object to that.

22 So let's say I did that. Would you agree that they  
23 should hear about the regs if they asked that question?

24 MR. GUERRIERO: If you had denied our motion and  
25 were going to instruct the jury that the regs were lawful?

1 THE COURT: No, no. Here's what I'm envisioning,  
2 okay? I'm envisioning a trial that doesn't involve the regs  
3 which is I think what your question assumes. Your question  
4 assumes they haven't heard anything about the regs, right?

5 MR. GUERRIERO: Well, it's certainly our position  
6 that the only registration requirement is the one imposed by  
7 the Treasury Secretary -- or implemented by the Treasury  
8 Secretary. Because the statute says the form and manner for  
9 registering a money transmitting business.

10 THE COURT: Maybe I lost it through your question.  
11 Let's try it one more time. The jury has a question. What is  
12 it?

13 MR. GUERRIERO: Okay. The jury says you've read to  
14 us the statute that makes a reference to the regulations.  
15 What are the regulations?

16 THE COURT: Oh. I'm not going to read them a  
17 statute. I'm going to give them jury instructions.

18 MR. GUERRIERO: And I guess our request would be,  
19 well, they have to be instructed that the form and manner of  
20 registration is the one prescribed by the Treasury.

21 THE COURT: By the regulations.

22 MR. GUERRIERO: And the regulation is invalid.

23 THE COURT: So let me assume your -- yeah, I'll go  
24 with your facts that they hear the statute that makes  
25 reference to the regulations and they ask me what? They're

1 deliberating. The note comes out and it says what?

2 Mark is trying to get your attention.

3 (Attorney Guerriero and Attorney Sisti confer)

4 MR. GUERRIERO: What co-counsel suggested, which I  
5 think is a good question, is what if the jury question is was  
6 this activity contrary to the regulations?

7 THE COURT: Normally I think -- if there hadn't  
8 been any evidence about that, the answer would normally be you  
9 haven't heard any evidence or testimony about the regulations.  
10 That's normally what you do in a situation like that, right?

11 But let's assume -- because, frankly, that was the  
12 question that came out in that earlier trial I was talking  
13 about, and we talked about answering it, right, if both sides  
14 could agree on an answer. That's the only way you could do  
15 that.

16 Okay. So the question comes out. I think, you  
17 know, and I can't commit to anything that's going to happen at  
18 this trial yet because we're not there, but I would probably  
19 instruct them that you've been instructed on the law and you  
20 are to apply it to the facts, and you haven't heard anything  
21 about those regulations. That's not the charge.

22 Because unless they're going to try to prove that  
23 up, there's no reason for the jury to be involved with asking  
24 that question, and that would be the answer for them, but I  
25 think I would try to -- if we had a trial that didn't involve

1 the regulations, okay, if the prosecution didn't make it an  
2 issue, I would try to instruct the jury in a way that didn't  
3 provoke that question. I guess I'm kind of undercutting your  
4 hypothetical.

5 But if it did come out, I would instruct them to  
6 focus on the law as I've instructed them and the facts as  
7 they've heard them. That's what I think I would do.

8 Now, it sounds like you're saying -- okay. So  
9 let's just play it out, though, because maybe I'm not thinking  
10 of something that you're envisioning.

11 The question comes out, did their filing comply  
12 with the regulations. What would your answer be? What would  
13 you propose I do with that?

14 MR. GUERRIERO: I would propose that you dismiss  
15 those counts at that point because what you had done is -- we  
16 had said, well, we're not going to decide that issue because  
17 we're going to just say that you can go on the basis of a  
18 violation of a statute. You had not decided the validity of  
19 the regs. Once they ask that question, then I don't think we  
20 can go forward.

21 THE COURT: For today though I don't think -- yeah,  
22 that's a good point, but I think that that's the kind of  
23 bridge I would have to cross when I came to it.

24 What I will decide today -- I want to take a little  
25 recess because I want to think this through a little bit more,



1 but I'm not sure -- I think my view at this point is that the  
2 major case doctrine isn't even implicated by this question  
3 because it's not an ambiguous statute, and I view that as a  
4 doctrine of statutory interpretation.

5 But even if I agreed with you, I'm not sure I agree  
6 that the major case doctrine is even implicated even if it is,  
7 as you say, not just a doctrine of statutory interpretation  
8 but a doctrine of the scope of regulatory authority.

9 That's probably what I would do for today's  
10 purposes, but I would maybe be in the position of having to  
11 refine that and adjust that come trial time. I get it, but I  
12 don't think it's a trial derailer to the extent you do, like  
13 requiring a dismissal or a mistrial.

14 Now I'll have you plotting and planning of course  
15 for a while, but that's just where I sit right now I think,  
16 you know.

17 Okay. It's a good question and it could happen. I  
18 would try to instruct the jury in a way to prevent it from  
19 happening. I really would, you know. We'll see.

20 All right. Let me take a recess.

21 Anybody want to say anything else before -- Mr.  
22 Sisti, you haven't spoken.

23 MR. SISTI: No. I mean -- I'm sorry. I hate to  
24 cut in.

25 THE COURT: That's okay.

1 MR. SISTI: But maybe it's the simple way I take a  
2 look at things.

3 I think that what you're actually going to see --  
4 the practical aspect of this case is that an indictment is  
5 going to be read to the jury. They're going to hear  
6 regulation.

7 THE COURT: This is you telling me you're going to  
8 read the indictment to the jury?

9 MR. SISTI: The indictment is out there.

10 THE COURT: Well, it's out there, but they don't  
11 usually read indictments.

12 MR. SISTI: I'm going to tell them what my client  
13 was charged with. Why can't I tell them what my client was  
14 charged with?

15 THE COURT: I didn't say that. I'm just asking you  
16 how would they hear it and --

17 MR. SISTI: And why wouldn't you take judicial  
18 notice of it? My client is sitting in this courtroom. That  
19 sheet of paper is what we're defending against.

20 THE COURT: What brought him here.

21 MR. SISTI: Yeah. How are they then going to be  
22 told, ignore the language, please ignore -- you know, please  
23 ignore that behind the curtain?

24 THE COURT: Well, actually, though, I think we've  
25 both seen -- we've both seen in our careers prosecutors say

1 we're not arguing X. We're only arguing Y. We're not asking  
2 you to convict him under variation X even though it's in the  
3 indictment. We've seen that. Aren't they free to do that?

4 MR. SISTI: They may be free to do that, but then  
5 the next layer of analysis is did the grand jury return that  
6 indictment based on the language within the four corners of  
7 the indictment, and is my client on trial on the regulation.  
8 The non-regulation, as we would put it.

9 THE COURT: Well, let me try to make it simple like  
10 you just did. Let's talk about a gun possession case, right?  
11 The indictment says he possessed the .38 and the .357 Magnum.  
12 It's right there in the indictment, .38 and mag, right?

13 MR. SISTI: Uh-huh.

14 THE COURT: And the prosecutor stands up and just  
15 says to them we're not asking you to convict him on the  
16 Magnum. We haven't presented enough evidence on the Magnum.  
17 We're asking you to convict him on the .38.

18 They can do that.

19 MR. SISTI: Well, that's one way of looking at it.  
20 The other would be that he's on trial for the possession of a  
21 controlled drug, a controlled drug, and you name three or four  
22 of them.

23 THE COURT: Right. Meth, fentanyl, cocaine.

24 MR. SISTI: Yeah. What did the grand jury come  
25 back with? Were they told they only had to find one?

1           THE COURT: I don't know what they were told  
2 because we don't know what grand juries normally are told,  
3 right, but if it says -- we know how to interpret indictments  
4 though, and if it says meth and coke and fentanyl, the jury  
5 can convict on any one of those. Especially if the  
6 prosecution disavows one of them or two of them and the jury  
7 is only instructed, right?

8           That could happen here. I'm not saying you  
9 couldn't read the indictment to the jury, I'm really not,  
10 because I think that's fair, but I'm not sure it meets the  
11 problem. It all depends, you're right, on how they are  
12 instructed and what evidence they hear at trial.

13          MR. SISTI: Right.

14          THE COURT: What you're telling me though is that,  
15 and I don't disagree, like, there's potentially a problem on  
16 the horizon. I get it.

17          MR. SISTI: Yeah. I mean, I'm just saying we're  
18 inviting some confusion here, and I don't know why we would  
19 want to do that when we can simplify the situation. I guess  
20 that's what I'm saying.

21          THE COURT: Well, by dismissing the indictment.

22          MR. SISTI: You can dismiss the indictment. They  
23 can bring another one. I mean, how about that?

24          THE COURT: I get it. They'll have to if I  
25 dismiss, or maybe they'll choose to if they don't want to buy

1 this issue. I get it. It's a fair point. I get it.

2 MR. SISTI: I mean, we don't mind -- you know, in  
3 all honesty we don't mind the issue, but I don't know why we  
4 would want to clutch onto it.

5 It is the first day of September. I mean, there  
6 are remedies that can be imposed at this point.

7 THE COURT: True enough. Fair point.

8 MR. SISTI: Thank you.

9 THE COURT: Mr. Aframe.

10 MR. AFRAME: I guess I tried to discuss with you  
11 sort of in good faith how I see the law. I guess now I'm very  
12 concerned that the strategy here is to inject the regulations  
13 for the purpose of -- I mean, I don't see the argument that  
14 they make as persuasive. I know we're talking about buying  
15 the argument on the Court of Appeals, and ultimately the Court  
16 has an interest in that. I, as the government, have an  
17 interest in that.

18 I guess I don't see that argument as particularly  
19 strong that -- you know, I mean, if the Court is not inclined  
20 to agree with that argument, the simplest way is to just make  
21 that ruling. If that's not the Court's position, then, I  
22 mean, I guess that's something else, but now I'm --

23 THE COURT: Wait a minute. I want to make sure I  
24 understand you. I'm not following you right now.

25 MR. AFRAME: Sorry.

1 THE COURT: If I want to buy what argument?

2 MR. AFRAME: It seems like the Court was inclined  
3 to not take the challenge to the regulations as a violation of  
4 the major questions doctrine head-on. And a way to avoid that  
5 question is to say we don't need the regulations because the  
6 statute gets us there.

7 THE COURT: Sure. But, I mean, if that wasn't  
8 clear from everything I've said so far -- yeah, that is part  
9 of my thinking.

10 MR. AFRAME: Right. And I guess what's concerning  
11 about the colloquy here is it doesn't seem like it's going to  
12 go that easily.

13 THE COURT: You think if I keep that out of the  
14 case or you do in your presentation or me in my instructions,  
15 you're afraid they're going to reinject it through some other  
16 means?

17 MR. AFRAME: Right. And I guess I'm concerned  
18 about that. I mean, just from my own perspective -- and the  
19 Court has its own, but I'm going to tell you my perspective.  
20 From my own perspective, I'm more worried about that than  
21 defending the ruling that these regulations are valid on  
22 appeal. I guess that's what I'm saying.

23 THE COURT: Right. Just plain valid.

24 MR. AFRAME: The major questions doctrine does not  
25 mandate the invalidation of FinCEN's registration requirement.

1 That's what's concerning me about what I just heard.

2 THE COURT: Understood. Okay.

3 MR. GUERRIERO: Can I just raise one other point,  
4 your Honor, quickly?

5 THE COURT: Yes. Of course.

6 MR. GUERRIERO: We don't really know yet how the  
7 government would try to prove their case, but how are they  
8 going to prove failure to register other than calling someone  
9 from a regulatory agency and have them say they didn't comply  
10 with our regulations?

11 THE COURT: Well, because by -- all that person has  
12 to say from FinCEN I guess or from the Treasury is there's no  
13 record of any such registration. It doesn't have to be an  
14 opinion that there had to be or that it applies to bitcoin.  
15 Just has it been registered. You could open up that can of  
16 worms, but that doesn't mean that they will. It depends on  
17 how they plan on trying their case, right?

18 MR. GUERRIERO: Well, as I said, I don't know  
19 exactly how they would present it, but I don't see how they  
20 would present it --

21 THE COURT: Well, I just told you how they would  
22 present it. Wouldn't they -- they would call up somebody from  
23 an agency. Do the records of the U.S. Treasury Department or  
24 any subsidiary agency thereunder contain a registration by Mr.  
25 Freeman of a bitcoin business, right? And the answer would be

1 yes or no. It wouldn't have to get into a whole, well, was he  
2 required to with that witness. That's how I think they would  
3 show it.

4 MR. GUERRIERO: But the only way that a person -- a  
5 representative from that agency, the only way they could  
6 answer that question is by reference to their own forms and  
7 regulations, and there is no other process for anybody to  
8 register.

9 THE COURT: But they didn't register. That's all  
10 they would be proving. They didn't register. There's no  
11 record of a registration.

12 Remember my view of the law is the statute required  
13 them to register.

14 Now, do your records have any record of such  
15 registration? No.

16 What else?

17 MR. GUERRIERO: Okay. Well, I'm just reiterating  
18 what I said earlier, but the statute requires them to register  
19 in the manner prescribed by the Secretary. That's exactly  
20 what it says. It says the Secretary shall prescribe the  
21 regulations for registration.

22 THE COURT: But I guess it would be up to you to  
23 develop that if you wanted to which is maybe kind of the  
24 subsidiary way of introducing this that Mr. Sisti was  
25 referring to a minute ago.



1 MR. GUERRIERO: I mean, maybe I'm not making myself  
2 clear.

3 THE COURT: Here's the thing. So you say, well, is  
4 there a manner for bitcoin? I mean, is there a manner of  
5 registration for bitcoin? Is there a form? Is there a this?  
6 Is there a that? And the witness could answer, but that would  
7 be you. That would be you putting it in the case, wouldn't  
8 it?

9 MR. GUERRIERO: But is the government going to -- I  
10 mean, the government has to show not only that they failed to  
11 register as required by the statute but they failed to  
12 register in accordance with the regulations promulgated by the  
13 Secretary. I mean, that's what the statute says. The manner  
14 of registration shall be prescribed by the Secretary.

15 THE COURT: I work for -- where do you register  
16 these things?

17 MR. AFRAME: FinCEN.

18 THE COURT: I work for FinCEN. Do you have a means  
19 and manner, a recognized process for registering bitcoin?  
20 Yes. Has any such registration been made by these defendants?  
21 No.

22 Problem?

23 MR. GUERRIERO: Yes. I think I would ask for a  
24 directed verdict if that was all of the evidence because they  
25 haven't introduced evidence of a failure to comply with the

1 regulations as prescribed by the Secretary, and the statute  
2 requires that.

3 THE COURT: Exactly. The statute requires -- oh.

4 MR. GUERRIERO: The statute requires the  
5 regulations, and there's only one way of getting licensed.

6 THE COURT: In my hypothetical I said, I asked does  
7 your agency have a form, a manner, a means of registering  
8 bitcoin? Yes.

9 Now, it exists. It didn't happen.

10 Why is that a directed verdict?

11 MR. GUERRIERO: Because they can't introduce --

12 THE COURT: And even if you get your directed  
13 verdict, he said he's not going to the jury with that anyway  
14 because it's disjunctive. He's saying I'm going to go with  
15 the statute.

16 MR. GUERRIERO: Then what's the violation of the  
17 statute? If they didn't violate a reg, they didn't violate  
18 the statute.

19 THE COURT: Failure to register. Period.

20 MR. GUERRIERO: Okay. I won't belabor it, but I  
21 think that the registration requirement under the statute  
22 requires regulations implementing it.

23 THE COURT: In a certain way. Oh, requires a  
24 regulation before the obligation even arises to comply with  
25 it?

1 MR. GUERRIERO: Exactly. Exactly. And it says the  
2 manner of registration shall be prescribed by the Secretary.  
3 The manner. And so if they don't put in evidence of the  
4 manner in which the person violated the regulations, then they  
5 haven't proven a violation of the statute.

6 THE COURT: So your point is even if they don't  
7 focus on the regs, just the statute, they can't prove their  
8 case --

9 MR. GUERRIERO: Without proving --

10 THE COURT: -- or the statute still requires a  
11 manner of registration that somehow still implicates  
12 administrative law in a way that the jury is going to have to  
13 hear about it.

14 MR. GUERRIERO: That's exactly right.

15 THE COURT: What do you say about that, Mr. Aframe?

16 Your point is -- and I guess -- by the way, I  
17 haven't forgotten your major point which is that these  
18 regulations are lawful. I'm with you.

19 MR. AFRAME: Okay. It says: Any person who  
20 controls or owns a money transmitting business shall register  
21 the business with the Secretary of the Treasury not later than  
22 180 days.

23 So they shall register the business.

24 Then the question is, what form do you have to -- I  
25 mean, Mr. Guerriero takes a very broad meaning of the form and

1 manner. I just take that to mean, okay, that's required by  
2 the statute. So as a matter of procedure --

3 THE COURT: How it looks.

4 MR. AFRAME: -- what do they have to do then?

5 They have to fill out the form. They have to  
6 provide this information, which by the way is in the statute,  
7 and they have to send it to us at our office in Washington,  
8 D.C., within 180 days of them doing that.

9 Have they done that? No. Have they filed anything  
10 with you? No. Have you sent them letters telling them to?  
11 Yes. Have they filed anything? No.

12 THE COURT: So I'm just going to play it out. Mr.  
13 Freeman's on the witness stand.

14 You never have to take the witness stand. Let's be  
15 clear about that. You know that. You have great counsel.  
16 It's just a hypothetical.

17 He gets on the witness stand. I tried. I looked  
18 at the law, and I didn't see a means or manner that applied to  
19 bitcoin. I couldn't.

20 MR. AFRAME: And that's because he understood the  
21 major questions doctrine didn't require him to do so?

22 THE COURT: No, just that I read it pre-2021. I  
23 read the statute and I didn't think the definition applied to  
24 my business.

25 MR. AFRAME: It doesn't matter because -- I mean,

1 he doesn't need that mens rea. That's not what's required.  
2 That's just what the law is now. I mean, this is a crime that  
3 doesn't require knowledge of the need to register. It  
4 requires only that you knew you didn't register, which he  
5 knows he didn't register. He might say I thought I didn't  
6 have to, but that's not a defense said Congress.

7 THE COURT: Mr. Guerriero's theory I guess assumes  
8 that the registration necessarily implicates a certain means  
9 and manner of registration that doesn't exist until a  
10 regulation that applied to bitcoin has been promulgated. I  
11 know that's kind of -- you don't have to accept that. I'm  
12 just trying to appreciate the argument for what it is, and  
13 that's what it is, right?

14 MR. AFRAME: And there's no dispute that there is  
15 such a regulation. That just goes back to him saying that  
16 regulation is invalid. That regulation exists and has existed  
17 throughout.

18 THE COURT: We're super in the weeds, but it's  
19 okay.

20 MR. AFRAME: Yes.

21 THE COURT: Brief recess.

22 MR. AFRAME: Okay.

23 (RECESS)

24 THE COURT: All right. I realize, by the way, we  
25 haven't talked about the motion for the bill of particulars.

1 So I'll give you a ruling on this motion, and then we'll talk  
2 about that.

3 All right. This motion to dismiss is denied. To  
4 me this is just a -- I don't think the major case and  
5 questions doctrine requires the dismissal of this indictment.  
6 I view the major case and questions doctrine not as a -- it  
7 certainly is a -- it's not primarily to the Court a doctrine  
8 about statutory administrative overreach. It is a doctrine of  
9 statutory interpretation.

10 To the extent it's about statutory overreach or  
11 about administrative overreach, it's only a question of  
12 administrative overreach when applied to an administrative  
13 agency's interpretation of its enabling legislation.

14 The bottom line though is it's a doctrine that  
15 determines whether the Court needs -- Courts interpret  
16 statutes, and the agency enforcing this statute is the  
17 Department of Justice. But in neither case, whether it's  
18 FinCEN or DOJ, it's not a situation where the Court is  
19 required to exercise deference to an administrative agency  
20 interpretation, which is what the major case and questions  
21 doctrine requires.

22 It's a scenario -- I tend to think of it in the way  
23 Chief Justice Roberts described it in King v. Burwell. It's a  
24 question of whether the Court needs to defer to an agency's  
25 interpretation of a statute in crucially important economic

1 and political questions.

2 Now, I'll explain in a minute or two why I don't  
3 even think the doctrine applies to this particular  
4 interpretive question, the alleged interpretation by FinCEN  
5 that prior to the 2021 amendments its registration  
6 requirements applied to bitcoin.

7 But that aside, there's no statutory ambiguity  
8 here. Funds clearly has always applied to bitcoin from the  
9 time bitcoin came into existence. Many Courts have ruled  
10 that, and this Court agrees.

11 The legislative activities leading up to and  
12 including the 2021 amendments don't change that. The statute  
13 was not changed vis-a-vis its application to virtual currency.  
14 It's arguably clarified, but it was not an expansion of the  
15 statute at least where virtual currency and bitcoin are  
16 concerned.

17 So it doesn't matter to this Court what FinCEN's  
18 interpretation of the statute was. I'm not deferring to it.  
19 I don't believe it's an ambiguous reference, the reference to  
20 funds, which is the key reference here in the statute. I  
21 don't think it requires deference to any agency. I think it's  
22 an unambiguous term that encompasses bitcoin and did prior to  
23 2021 when the amendments were enacted. That's number one.

24 So, frankly, I don't need to decide whether the  
25 major case and questions doctrine applies here. I just

1 interpret the statute to cover bitcoin and require the  
2 registrations at issue here.

3 I want to be clear about this. There was a lot of  
4 conversation in the hearing about removing the regs from the  
5 criminal trial. I'm not suggesting that that's legally  
6 necessary at all. It was just a sort of conversation to me  
7 about the way the prosecution might have attempted to kind of  
8 avoid this issue to the extent it's an issue. I don't think  
9 it's an issue. So I just don't want to have anybody interpret  
10 this as a ruling that somehow the administrative law scheme is  
11 out of the case. That's up to the prosecution. I'm not  
12 ruling that it needs to be.

13 So, number one, I don't think the major case and  
14 questions doctrine is implicated here.

15 Number two, there's another reason I don't think  
16 it's implicated here. I don't think this is a major case or  
17 question. I'm not trying to say it's unimportant. I'm just  
18 saying that it doesn't rise to the level of major cases and  
19 questions that have been recognized by the Supreme Court and  
20 other courts in areas like the Affordable Care Act or the  
21 environmental regulatory scheme implicated by the recent EPA  
22 versus West Virginia case. So that's number two.

23 Number three, even if this was a major case or  
24 question, my view is that FinCEN was acting within its  
25 authority based on a clear delegation.



1 Congress's statement was that the agency could  
2 regulate "any other person who engages as a business in the  
3 transmission of funds, including any person who engages as a  
4 business in an informal money transfer system or any network  
5 of people who engage as a business in facilitating the  
6 transfer of money domestically or internationally outside of  
7 the conventional financial institution's system."

8 In 31 U.S.C. 5330, the West Virginia case, the  
9 issue was whether a broader conception of EPA's authority was  
10 within the power granted to it by the Clean Air Act, and the  
11 EPA took it further than the statutory delegation.

12 This isn't that kind of situation at all. When  
13 Congress recently amended 5330 to include virtual currency, it  
14 hadn't considered or rejected bills like that in the past,  
15 which would suggest that FinCEN was attempting, like, some  
16 type of regulatory workaround to these prior legislative  
17 failures. There were no such failures.

18 The amendment was to allow FinCEN "to continue the  
19 financial system from illicit activity, counter money  
20 laundering and the financing of terrorism, and promote  
21 national security," skipping some text here, "Although the use  
22 and trading of virtual currencies are illegal practices, some  
23 terrorists and criminals sought to exploit vulnerabilities in  
24 the global financial system and increasingly relied on virtual  
25 currencies to move illicit funds."

1 I'm citing Public Law No. 116-283 there, 134  
2 statute 3388. Pinpoint cite to 4552 in 2021.

3 So, look, that's the ruling, though. The major  
4 case and questions doctrine is not implicated. It's not  
5 implicated because this is not an ambiguous delegation of  
6 authority that requires judicial deference to Executive Branch  
7 authority, number one.

8 Number two, it's not implicated because it's not a  
9 major case or question in my view. And, third -- well, if it  
10 is implicated, I think FinCEN was in compliance.

11 Mr. Guerriero's very interesting argument about the  
12 delegation of authority to FinCEN to establish the means and  
13 manner of registration, I view that as really more just  
14 procedural, you know, not that no such registration was  
15 required until the establishment of such a process.

16 I will write an order on this. I can't guarantee  
17 you, though, it's going to be written by trial. It may be.  
18 It may not be. Usually, like, when I write a suppression  
19 order, I rule from the bench and don't issue the written order  
20 until much later, if necessary, and that's how I'm going to  
21 approach this, but the motion is denied.

22 All right. Let's talk about the bill of  
23 particulars. I'll give you my take on this -- well, and you  
24 can incorporate that into your argument.

25 I'm probably a little bit -- my approach of a bill

1 of particulars probably isn't perfectly aligned with federal  
2 law because I guess my experience with state practice taught  
3 me that, you know, a bill of particulars can be helpful to  
4 criminal prosecutions. I don't mean helpful to the  
5 prosecution but helpful to the process and putting everybody  
6 on notice of what's going on. But federal law doesn't  
7 generally require them except under very specific  
8 circumstances. I, nonetheless, have ordered them in the past,  
9 and I exercise my discretion generally to do so only because I  
10 think it's a helpful part of the process.

11 Of course the part you have to be careful about is  
12 not adding to the prosecution's burden of proof with a bill in  
13 a situation where that isn't the legal effect. Because in the  
14 state system when you issue a bill, that becomes, like, the  
15 elements. And so when I issue an order on this, to the extent  
16 they order a bill, I'll be careful about making that clear one  
17 way or the other whether it's any kind of modification.

18 So I guess all I'm trying to say to you is I'm  
19 usually pretty open to a bill of particulars. I believe in  
20 criminal defendants being placed on notice of the charges  
21 against them beyond just the fact that something is  
22 quote-unquote in the discovery.

23 Go ahead, Mr. Sisti.

24 MR. SISTI: I think that's the bottom line. I  
25 mean, the reference in the discovery is quite interesting,

1 but, you know, as we're receiving discovery as recently as  
2 August 22nd of this year in the form of hundreds of more  
3 pages, it begins to concern me as to whether or not we can  
4 have this tailored and ready to go depending on the 7,700 --  
5 or 7,000 plus pages of discovery we already have.

6 I mean, I can make it pretty simple for the Court.  
7 Naturally, we would like to have witnesses. I mean, that  
8 could really get to the heart of the whole thing if we knew  
9 who was going to be called. I mean, we're 60 days before  
10 trial.

11 THE COURT: Uh-huh.

12 MR. SISTI: I don't think I'm asking for much. I  
13 mean, they must know who their witnesses are by now. I know  
14 they've been doing interviews as recently as about ten days  
15 ago, and we're getting reports, but I don't even know if  
16 they're locked in as actual witnesses, their interviews.

17 With regard to the specificity of the individuals  
18 that were "paid," you know, I don't know who they are. We  
19 haven't gotten a Giglio material update.

20 THE COURT: I'm assuming that they were some of the  
21 co-defendants. That's just an assumption.

22 MR. SISTI: Yeah. I mean, I know what's going on  
23 with regard to the plea arrangements, but I'm not quite sure  
24 what the exact arrangements were with regard to Giglio  
25 material.

1           THE COURT: I've been asking at those pleas, you  
2 know, is this a person we can expect to hear from at trial, is  
3 there a 5K, and the answer has generally been no 5K and no  
4 agreement.

5           MR. SISTI: That's why I guess that's troubling me.  
6 So who would they be then? I don't know. No 5K and no  
7 agreement also means I don't know if they're on the witness  
8 list.

9           THE COURT: Yeah. I get it.

10          MR. SISTI: I think we're thinking the same way,  
11 Judge. I mean, I'm not particularly interested in expanding  
12 their burden of proof, but they're going to have to hit these  
13 elements and they're going to have to give me the information  
14 that I'm asking for anyhow.

15          THE COURT: Well, let me ask you this question.  
16 Are you basically saying that if you can get a witness list,  
17 like, well in advance of the usual deadline, that that's more  
18 important to you than a bill of particulars?

19          MR. SISTI: I have to be honest with you. That  
20 would actually clarify where we're going here. I mean, you  
21 know, we're taking shots in the dark now wondering  
22 who's coming.

23          THE COURT: Have you had that conversation with  
24 these people?

25          MR. SISTI: I think I filed that motion back in

1 late July. That's a conversation from what I can tell.

2 THE COURT: All right. I get it.

3 MR. SISTI: Thank you.

4 THE COURT: Mr. Kennedy.

5 MR. KENNEDY: If that will sort of resolve this  
6 issue, the government is happy to provide a sort of witness  
7 list of who we would intend to call understanding that a lot  
8 of these witnesses are elderly. We are still working on how  
9 we're going to get some of these people to trial due to their  
10 disabilities. But we're happy to provide a witness list with  
11 the understanding that, you know --

12 THE COURT: They may not all get called. I get it.

13 MR. KENNEDY: Yeah.

14 THE COURT: I don't think they're going to object  
15 to anybody you don't call.

16 All right. Let's talk turkey then. By when?

17 MR. KENNEDY: By early next week? Late next week?

18 By Friday next week?

19 THE COURT: If by the end of next week you get a  
20 witness list, does that put you in a position to --

21 MR. SISTI: If I can just have a moment, your  
22 Honor?

23 THE COURT: Yeah.

24 (Attorney Sisti confers with Attorney Guerriero)

25 MR. SISTI: Your Honor, if we get a realistic

1 witness list and not some complete saturation of every name  
2 that's in there, that's fine.

3 THE COURT: Yeah. I don't think these people would  
4 do that.

5 MR. SISTI: We've all seen that.

6 THE COURT: Because we're trying to work it out.  
7 Yeah, not the 150 witness list.

8 MR. KENNEDY: I think these would be realistic  
9 people that we would anticipate that we would actually prep  
10 and want to call.

11 THE COURT: The way I put it in my pretrial is the  
12 actual will-call witness list, right? You can provide that,  
13 understanding that you probably can't deliver a hundred  
14 percent on it, by next Friday. Can you live with that?

15 MR. SISTI: We're good with that.

16 THE COURT: All right. I'm going to rule on the  
17 motion to withdraw and by agreement in reliance on the  
18 arrangements here today. Fair enough?

19 MR. SISTI: That's fine. Yes.

20 THE COURT: All right.

21 Counsel, that was very well argued. I appreciate  
22 it. I always appreciate when people are so well prepared and  
23 articulate and persuasive.

24 Anything else I can do for you people? You've got  
25 a couple motions that aren't ripe yet, the motions in

1     limine and the Daubert. Anything else?

2             MS. MACDONALD: The only other thing, your Honor,  
3     is they filed a notice of public authorities defense that we  
4     filed a response to that I think is ripe if there was anything  
5     the Court wanted to hear on that.

6             THE COURT: I guess I'm not ready to rule on it  
7     because I haven't focused on it.

8             MS. MACDONALD: Okay.

9             THE COURT: Do you want to talk about it though?  
10    Go ahead. I'll listen. Maybe I can just --

11            MR. SISTI: I mean, we've had a lot of discussion  
12    that's been dancing around that whole issue all morning. I  
13    mean, if you just look at the defense motion to dismiss on  
14    page 12, a lot of it has to do with that.

15            I mean, there is reliance on this particular  
16    representation from banking in the state of New Hampshire that  
17    was -- we amended that or attached that to the pleading that  
18    actually came from an actual authority in the state of New  
19    Hampshire.

20            I think the federal government's approach as to it  
21    has to be a federal employee or a federal agent is probably  
22    misplaced. I mean, I just two weeks ago pled a case in here  
23    that had to do with a patrol officer in Hooksett making an  
24    arrest. I mean, he's not a federal agent, but if he did make  
25    some representation to my client hypothetically in that case



1 that allowed him to break the law somehow or another and my  
2 client relied upon it, then I would believe that this  
3 particular notice and this procedure of placing the government  
4 and the Court on notice would basically be the way we would  
5 deal with that.

6 THE COURT: So a public authority defense,  
7 though -- talk to me mechanically, like, what it means and how  
8 it works.

9 MR. SISTI: The public authority defense that we  
10 would be relying on is that our client, at least Mr. Freeman,  
11 relied upon a specific statement that was made by a recognized  
12 public authority in the state of New Hampshire dealing  
13 specifically with the operation that was taking place. And  
14 that's memorialized in a letter from Freeman's lawyer, the  
15 church's lawyer, all right, that was appended to the pleading.  
16 It lays it right out. That's in the head of him as he's going  
17 forward with the transactions that are taking place.

18 There is no question that she was a public  
19 authority, and I don't think that you get to just say, well,  
20 it's a state authority so you can't bring this to the  
21 attention of the Court that it somehow releases you from this  
22 particular approach on defending, okay? It's a person with  
23 authority, a banking person, dealing with the subject matter  
24 that is the subject of this prosecution. It has to do with  
25 money transmission. It has to do with licensing.

1 THE COURT: Okay. I get it.

2 Is your objection -- I think I actually read it. I  
3 just don't remember.

4 AUSA MacDonald, is your objection that they  
5 shouldn't get a jury instruction on it or that a jury  
6 shouldn't even hear about it?

7 MS. MACDONALD: Well, it's sort of two issues.  
8 There's my response to this, and then I filed a motion in  
9 limine to exclude the evidence of the state law.

10 THE COURT: Okay. Mr. Sisti says -- you can  
11 probably cut right to it. I can't guarantee you I'll rule  
12 right now, but he says I don't think you can distinguish  
13 between state and federal, and you're probably about to tell  
14 me, yeah, you probably can, right?

15 MS. MACDONALD: Yes.

16 THE COURT: That sounds like federal law to me  
17 that, you know, will probably develop, but is that the law?

18 MS. MACDONALD: Well, I mean, yeah, that's the law.

19 I mean, there is another prong of 1960 that we  
20 didn't charge that criminalizes failure to comply with the  
21 state law, but this has nothing to do with it. A state  
22 banking official talking about state law has absolutely no  
23 relevance to the federal law which the defendant is charged.

24 THE COURT: I see the law is there. My question  
25 is, is there authority for that proposition?

1 MS. MACDONALD: There is.

2 THE COURT: Okay. I'll look at it.

3 MR. SISTI: I mean, if you take a look at this  
4 thing and you set it over here -- if one of my clients was  
5 being prosecuted let's say for possession of child pornography  
6 and his local police department comes to him and takes his  
7 phone and says, well, you're okay because, you know, that  
8 individual was 16 or something like that, it could be a  
9 mistake that that person relayed to my client, but my client  
10 certainly could say, okay, I feel safe now. If I'm dealing  
11 with someone that's 16 or over, okay, it's okay. Well, it's  
12 not okay, all right? It's not okay. If it's charged in  
13 federal court, it's certainly not okay, but you can certainly  
14 rely on that authority and you can bring that to the attention  
15 of the jury. Why would you be barred from that? Especially  
16 if there's a prosecution --

17 THE COURT: It's not that your argument doesn't  
18 make sense to me, because it does. It's just that it wouldn't  
19 surprise me -- and I just don't remember. It wouldn't  
20 surprise me though if there have been federal decisions that  
21 have just plain ruled that out. I just don't know yet. I'll  
22 look at that.

23 MR. SISTI: Okay. But if it's being prosecuted in  
24 this courtroom and it's being developed by a local official --

25 THE COURT: I know. Right?

1 MR. SISTI: Yeah.

2 THE COURT: It's one of those -- you know, the  
3 analogy is like double jeopardy though, right, sort of, right?

4 MR. SISTI: I don't know. It's single jeopardy  
5 because if you think about it --

6 THE COURT: Oh, I know it's not double jeopardy.  
7 The analogy though is, right? Because we know you can be  
8 charged federally for crimes after you're acquitted in state  
9 court. That happens. It's sort of the same thing. It's not  
10 exactly the same, but it's sort of the same thing though, and  
11 the law on that particular issue is not defendant friendly,  
12 you know.

13 MR. SISTI: No, it's understood.

14 THE COURT: I'll look at it though and I'll get you  
15 a ruling well in advance. There won't be any question about  
16 how the trial is going to play out. You'll know one way or  
17 the other.

18 MR. SISTI: Thank you.

19 MS. MACDONALD: Thank you.

20 THE COURT: Okay. Kellie, anything you want me to  
21 cover that I haven't picked up?

22 (Off the record)

23 (Conclusion of hearing at 11:35 a.m.)

24

25

## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings to the best of my knowledge, skill, ability and belief.

Submitted: 3-1-23      /s/ Susan M. Bateman  
SUSAN M. BATEMAN, RPR, CRR